

# ELLIS:LAWHORNE

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May 21, 2004

## **VIA ELECTRONIC MAIL AND HAND-DELIVERY**

The Honorable Bruce Duke  
Executive Director  
**South Carolina Public Service Commission**  
Saluda Building  
101 Executive Center Dr.,  
Suite 100  
Columbia, SC 29210

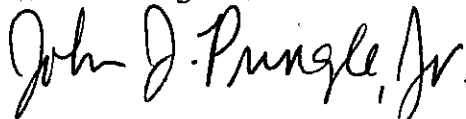
RE: Petition by KMC Telecom III LLC, KMC Telecom, V., Inc. and KMC Data LLC  
for Arbitration of an Interconnection Agreement with United Telephone Company  
of the Carolinas, Pursuant to Section 252(b) of the Communications Act of 1934,  
as Amended  
Docket No. 2004- -C, ELS File No. 803-10244

Dear Mr. Duke:

Please find enclosed for filing fifteen (15) copies of the **Petition for Arbitration** filed  
on behalf of KMC Telecom III LLC, KMC Telecom V Inc., and KMC Data LLC in the above-  
referenced matter.

Please date-stamp the attached letter upon receipt and return it via the bearer of these  
documents. Should you have any questions concerning this matter, please contact me.

With kind regards,



John Pringle, Jr.

cc: Andrew M. Klein, Esquire  
all parties of record

**BEFORE THE  
SOUTH CAROLINA PUBLIC SERVICE COMMISSION**

**In the Matter of the  
Petition by KMC Telecom III LLC,  
KMC Telecom V, Inc., and KMC Data LLC  
for Arbitration of an Interconnection  
Agreement with United Telephone  
Company of the Carolinas Pursuant to  
Section 252(b) of the Communications Act  
of 1934, as Amended.**

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**Docket No. \_\_\_\_\_**

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**PETITION FOR ARBITRATION**

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KMC Telecom III LLC (“KMC III”), KMC Telecom V, Inc. (“KMC V”) and KMC Data LLC (“KMC Data”) (collectively, “KMC”), pursuant to Section 252(b) of the Communications Act of 1934, as amended (“Act” or “Communications Act”); S.C. Code Section 58-9-280(D); Article 8, Practice and Procedure, Public Service Commission Rules and Regulation; and other applicable statutes, rules and regulations, and decisions, hereby files this Petition for Arbitration (the “Petition”) seeking resolution of certain issues arising between KMC and United Telephone Company of the Carolinas (“Sprint”) in the negotiation of an interconnection agreement. In support of this Petition, KMC states as follows:

## **I. DESIGNATED CONTACTS**

1. All communications and submissions in this proceeding, including but not limited to, correspondence, notices, inquiries, and orders, should be served upon the following designated contacts for KMC:

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with copies to:

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2. Sprint's lead negotiating attorney is:

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Sprint, Legal and External Affairs

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Janette.w.luehring@mail.sprint.com

## **II. STATEMENT OF FACTS**

3. KMC V is a Delaware corporation, and KMC III and KMC Data are Delaware limited liability corporations. All three corporations are headquartered at 1545 Route 206, Bedminster, NJ 07921-2567, and maintain their principal place of business at 1755 North Brown Road, Lawrenceville, Georgia, 30043. KMC V, KMC III and KMC Data are, collectively, nationwide facilities-based providers of next-generation telecommunications infrastructure and services, providing fiber-based, integrated data, voice, and Internet communications services. They offer these services to business, government and institutional end-users, Internet service providers, long distance carriers and wireless service providers. They are, collectively, certified to provide telecommunications services in 49 states, the District of Columbia, and Puerto Rico. KMC V, KMC III and KMC Data are authorized to provide competitive local exchange and interexchange services in South Carolina, including the territories served by Sprint.<sup>1</sup>

4. Sprint is an incumbent local exchange carrier ("ILEC") in South Carolina, as defined by the Communications Act. *See* 47 U.S.C. § 252(h). Within its operating territory, Sprint has, at all relevant times, been a monopoly provider of telephone exchange service.

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<sup>1</sup> KMC III was authorized to provide intrastate interexchange services, switched and special access, and local exchange telecommunications services pursuant to Docket No. 96-337-C, Order No. 97-149 (February 24, 1997); KMC V has been granted a certificate of local exchange and interexchange authority by the Commission in Docket No. 2001-17-C, Order No. 2001-297 (April 30, 2001); KMC Data has been granted a certificate of local exchange and interexchange authority by the Commission in Docket No. 2001-132-C; Order No. 2001-708 (April 11, 2001).

5. Pursuant to the Communications Act, Sprint is required to provide to requesting telecommunications carriers, through negotiation or otherwise, interconnection, access to unbundled network elements (“UNEs”), collocation, number portability, dialing parity, access to rights-of-way, reciprocal compensation, and resale, among other things. *See* 47 U.S.C. §§ 251(a)-(c). The terms and conditions of interconnection must comply with the provisions of Sections 251 and 252 of the Communications Act. *See* 47 U.S.C. § 251(c). Section 252(d) governs the pricing of UNEs, interconnection, reciprocal compensation, and resale services.

6. Sprint and KMC (“the Parties”) entered into an interconnection agreement (“Interconnection Agreement”) in the year 2000, which was subsequently approved by the Commission. By agreement between Sprint and KMC, the Parties agreed to continue to operate pursuant to the terms of the Interconnection Agreement following the stated expiration date, until such time as a new interconnection agreement was approved.

7. On May 8, 2002, Sprint, KMC Telecom II, Inc., KMC III and KMC V executed a Settlement and Release Agreement (“Settlement”) to resolve pending disputes between the Parties. Among the items addressed by the Settlement are several issues identified in this Petition as being unresolved, including, but not limited to, the issue of payment by Sprint of compensation for the termination of traffic by KMC. Clearly, those issues should be easily resolved by reference to, and incorporation of the terms of, the Settlement, as contemplated by the Settlement itself.<sup>2</sup>

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<sup>2</sup> While the Confidentiality clause contained in the Settlement permits disclosure of its contents as necessary to enforce the provisions thereof, the Settlement document has not been attached hereto. It is KMC’s preference, and we believe that of Sprint as well, to provide the Settlement to the Commission under seal, if the Commission determines that disclosure to the Commission is necessary.

### **III. BRIEF SUMMARY OF NEGOTIATION HISTORY**

8. In accordance with the terms of the Settlement, the Parties began negotiation of a new interconnection agreement that would cover several states, including South Carolina. Sprint proposed its boilerplate interconnection agreement, from which the Parties would commence interconnection negotiations. For the purpose of this arbitration, interconnection negotiations commenced on December 13, 2003, resulting in a state commission arbitration window opening on April 26, 2004, and closing on May 21, 2004.

9. During the course of the interconnection negotiations, KMC and Sprint held numerous meetings, both in person and by telephone, to discuss the rates, terms and conditions pursuant to which Sprint would provide to KMC interconnection, access to UNEs, and collocation, among other things. In fact, KMC personnel and one of the undersigned counsel even traveled to Sprint's headquarters in Overland Park, Kansas, in an attempt to reach a mutually acceptable agreement. As a result of these good faith negotiations, Sprint and KMC reached agreement on many of the issues raised. However, Sprint and KMC have not resolved a number of other issues. Consequently, KMC is filing the instant Petition pursuant to Section 252 of the Communications Act and other applicable law to address the issues that remain unresolved.

### **IV. NEGOTIATION AND ARBITRATION TIMELINE**

10. Under the Communications Act, parties to an interconnection negotiation have the right to petition the relevant state commission for arbitration of any open issue whenever negotiations between them fail to yield an agreement. *See* 47 U.S.C. § 252(b). Either party may seek arbitration during the period between the 135<sup>th</sup> day and the 160<sup>th</sup> day, inclusive, after the date the ILEC received the request for negotiation. *Id.*

11. Because for the purpose of this arbitration interconnection negotiation commenced on December 13, 2003, the arbitration window opened on April 26, 2004, and closes on May 21, 2004. Accordingly, this Petition is timely filed. Section 252(b)(4)(C) of the Communications Act requires that the Commission conclude the resolution of any unresolved issues within nine (9) months after the request for interconnection negotiation was initiated. 47 U.S.C. § 252(b)(4)(C).

## V. JURISDICTION AND APPLICABLE LAW

12. The Federal Communications Commission (the “FCC”) established the appropriate standard for arbitration under Sections 251 and 252 of the Communications Act in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (rel. Aug. 8, 1996) (*Local Competition Order*). Pursuant to the *Local Competition Order*, the Commission must do the following in an arbitration: (1) ensure resolution and conditions satisfying Section 251 of the Communications Act, including the regulations promulgated by the FCC; and (2) establish rates for interconnection and UNEs according to Section 252(d) of the Communications Act.

13. The Commission must make an affirmative determination that the rates, terms, and conditions that it prescribes in this arbitration proceeding for interconnection are consistent with the requirements of Section 251(a)-(c) and Section 252 of the Communications Act.

14. Section 251(b) of the Communications Act, 47 U.S.C. § 251(b), states that each local exchange carrier has the following duties:

- (1) the duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications service;

- (2) the duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the FCC;
- (3) the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays;
- (4) the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224 of the Act; and
- (5) the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

**15.** Section 251(c) of the Communications Act states that each incumbent local exchange carrier, such as Sprint, has the following additional duties:

- (1) the duty to negotiate in good faith;
- (2) the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access at any technically feasible point within the carrier's network that is at least equal in quality to that provided by the local exchange carrier to itself, or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection on rates, terms and conditions that are just, reasonable and nondiscriminatory;
- (3) the duty to provide, to any requesting telecommunications carrier, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory and in such a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service;
- (4) the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers and not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of such services;



- (5) the duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks; and
- (6) the duty to provide, on rates, terms and conditions that are just, reasonable and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that virtual collocation may be provided if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

16. Section 252(d) of the Communications Act sets forth the applicable pricing standards for interconnection and network element charges as well as for transport and termination of traffic. Section 252(d)(1) of the Communications Act states, in pertinent part, that "determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment . . . and the just and reasonable rate for network elements . . . shall be (i) based on the cost (determined by reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and [(iii)] may include a reasonable profit." 47 U.S.C. § 252(d)(1). Section 252(d)(2) further states in pertinent part that "a State commission shall not consider the terms and conditions for reciprocal compensation [for transport and termination] to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of another carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2).

## **VI. ARBITRATION ISSUES AND POSITIONS OF THE PARTIES**

17. The Parties have resolved many of the issues and negotiated contract language to govern the Parties' relationship as reflected in the issues matrix, which is attached hereto and incorporated herein by reference as *Exhibit 1*. The unresolved issues between KMC and Sprint, and KMC's and Sprint's respective positions as to each unresolved issue, are detailed below and in *Exhibit 1*. Due to the imminent close of the statutorily prescribed arbitration window, and in order to preserve its statutory rights under Section 252 of the Communications Act, KMC is compelled to seek arbitration of a number of issues which remain under discussion between Sprint and KMC. KMC remains hopeful that some or all of these issues will be resolved prior to hearing, through continued negotiations. Also attached hereto and incorporated herein by reference as *Exhibit 2* is an initial draft interconnection agreement, which reflects the *status quo* as of December 2003. A revised draft agreement will be provided to the Commission in the coming weeks, as the Parties incorporate the results of their recent negotiations into the draft.

### **PART B OF THE AGREEMENT: GENERAL TERMS AND CONDITIONS**

*Issue No. B.5 [Item No. 7]: Should each Party be required to include limitation of liability language in its end user contracts and tariffs?*

**Legal Requirements:** The Communications Act does not specifically address this issue.

**KMC's Position:** No. Such language is inappropriate and may not, in any event, effectively limit third-party rights.

**Sprint's Position:** Yes, each Party must be required to include language limiting liability.

### **PART C OF THE AGREEMENT: GENERAL PRINCIPLES**

*Issue No. C.2 [Item No. 11]: Should the provision of the interconnection agreement regarding security deposits apply to both parties?*

**Legal Requirements:** The Communications Act requires ILECs to interconnect on “rates, terms and conditions that are just, reasonable and nondiscriminatory.” (47 USC § 251(c))

**KMC's Position:** Yes. To the extent Sprint insists on including a provision regarding security deposits in the interconnection agreement, the provision should be applied equally to both KMC and Sprint. Sprint's position is discriminatory and assumes that KMC is not entitled to any assurance of future payment from Sprint.

**Sprint's Position:** No. Sprint does not believe that it is appropriate to make the deposit provisions reciprocal.

*Issue No. C.5 [Item No. 14]: Should bill-and-keep apply to VoIP calls, to the extent they can be identified, until the proper regulatory classification of VoIP is resolved by the appropriate federal or state regulatory or judicial body?*

**Legal Requirements:** The law on this issue remains unsettled. On March 10, 2004, the FCC issued a Notice of Proposed Rulemaking (“NPRM”) regarding services and

applications that make use of Internet Protocol. (FCC 04-28, WC Docket No. 04-36) The FCC sought comment on IP-enabled services that are currently available, such as voice over IP, and services that are expected to become available in the future. The FCC invited comment on how it should distinguish among the services and whether any regulatory treatment would be appropriate for any class of service. Comments in response to the NPRM are due on or before May 28, 2004.

While the FCC recently issued two declaratory rulings, it took care to note that its decisions apply only to the specific type of traffic involved and specifically described, in detail, the characteristics of such traffic. (FCC 04-27, WC Docket No. 03-45 and FCC 04-97, WC Docket No. 02-361). The FCC specifically noted, in the latter of the two rulings, that it “in no way intend[s] to preclude the Commission from adopting a different approach when it resolves the *IP-enabled Services* rulemaking or the *Intercarrier Compensation* rulemaking proceeding.” (FCC 04-97 at ¶ 2) At least one federal District Court has already concluded that a state Commission could not rely on state law to regulate VoIP services in any manner because federal regulation completely pre-empted the field. *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, Civil File No. 03-5287, Memorandum and Order of October 16, 2003 (D. Minn.).

**KMC’s Position:** Yes, bill-and-keep should apply to VoIP calls, to the extent they can be identified, until the proper regulatory classification of VoIP is determined. Since the FCC has not made a definitive ruling on the regulatory classification of VoIP traffic, the interconnection agreement should not contain any provision that prejudices that classification. However, to the extent that any VoIP calls are exchanged and can be identified as such, they should be exchanged on a bill-and-keep basis.

**Sprint's Position:** No. VoIP traffic is similar to traditional voice telephony and should be treated that way in the interconnection agreement.

**PART E OF THE AGREEMENT: NETWORK ELEMENTS**

*Issue No. E. 22 [Item No. 18]: Should Sprint be permitted to begin billing KMC for a loop before confirmation that the loop is working?*

**Legal Requirements:** Sprint has an obligation to provide, to any requesting telecommunications carrier, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory and in such a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. *See* 47 U.S.C. § 251(c)(3).

**KMC's Position:** No. Prior to the commencement of billing, Sprint should be required to perform pre-service tests, as required, to ensure that the services have been properly installed and are being delivered to the appropriate points. Actual billing for a loop and any related trouble tickets and reports should not begin until the loop has been accepted by KMC, or on the due date for acceptance testing if KMC declines the opportunity to test on the scheduled testing date.

**Sprint's Position:** Yes. To the extent KMC requires additional testing beyond the basic testing already provided by Sprint, KMC must request such testing through the BFR process or in the CLEC Forum.

***Issue No. E. 25 [Item No. 19]: Should Sprint conduct cooperative trouble testing when KMC isolates a problem to Sprint's network?***

**Legal Requirements:** Sprint has an obligation to provide, to any requesting telecommunications carrier, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory and in such a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. *See* 47 U.S.C. § 251(c)(3).

Under the Communications Act, each telecommunications carrier has the “duty . . . [t]o not install network features, functions or capabilities that do not comply with the guidelines or standards as provided in the Commission’s rules or section 255 or 256 of the Act.” (47 C.F.R. § 51.100(a)(2)).

**KMC’s Position:** Yes. Once KMC determines that a reported problem does not lie within its network, it is incumbent upon Sprint to test its network to identify and correct the problem.

**Sprint’s Position:** Sprint has not proposed language, and maintains that it is addressed elsewhere.

*Issue No. E. 77 [Item No. 29]: May Sprint prohibit KMC from commingling UNEs with wholesale services purchased from a third party? Should the parties' interconnection agreement state that Sprint will provide UNEs pursuant to applicable law?*

**Legal Requirements:** The Communications Act requires an ILEC to provide unbundled network elements in a manner that allows requesting carriers to combine such UNEs to provide telecommunications services. (47 U.S.C. § 251(c)(3)). Under FCC rules, an ILEC may not impose “limitations, restrictions or requirements on requests for, or the use of, unbundled network elements, for the service a requesting telecommunications carriers seeks to offer.” (47 C.F.R. § 51.309(a)). Moreover, Section 251 requires ILECs to provide unbundled access to network elements in accordance with the requirement of the parties’ interconnection agreement and sections 251 and 252 of the Communications Act. (47 U.S.C. § 251(c)(3)).

**KMC’s Position:** Sprint may not prohibit KMC from commingling UNEs obtained from Sprint with elements purchased from a third party. Moreover, the parties’ agreement should explicitly state that Sprint will provide UNEs in accordance with applicable law.

**Sprint’s Position:** KMC may commingle a UNE or UNE combination with wholesale services purchased from Sprint only. Sprint will provide access to voice UNE-P and EELs as provided in the interconnection agreement; any request to provide UNEs that are not specifically provided for in the agreement must be made pursuant to the BFR process.

***Issue No. E. 80 [Item No. 32]: Should Sprint be permitted to audit KMC's UNE-P customer base?***

**Legal Requirements:** FCC rules only permit an ILEC to conduct audits to determine a competitive carrier's compliance with the qualifying service eligibility for EELs. (*Triennial Review Order* at ¶ 626).

**KMC's Position:** Sprint should not be permitted to audit KMC's UNE-P customer base.

**Sprint's Position:** Yes. Sprint seeks to audit KMC's customer base, utilizing the Agreement's general audit provisions.

***Issue No. E.92 [Item No. 39]: What eligibility criteria apply to EEL access?***

**Legal Requirements:** FCC rules and the *Triennial Review Order* require incumbent LECs to make UNE combinations, including loop-transport combinations, available in all areas where the underlying UNEs are available and in all instances where the requesting carrier meets eligibility requirements.

**KMC's Position:** For each 24 DS1 EELs or other facilities having equivalent capacity, KMC must maintain at least one active DS1 local service interconnection trunk, and KMC is required to transmit the calling party's number in connection with calls exchanged over each trunk. An interconnection trunk meets the requirements of this paragraph if the requesting telecommunications carrier will transmit the calling party's number in connection with calls exchanged over the trunk.



**Sprint's Position:** For each 24 DS1 EELs or other facilities having equivalent capacity, KMC must maintain at least one active DS1 local service interconnection trunk and KMC is required to transmit the calling party's number in connection with calls exchanged over each trunk. Where KMC does not establish an interconnection arrangement with Sprint for the meaningful exchange of Local Traffic that flows in both directions, such interconnection arrangement shall not satisfy this criteria.

*Issue No. E. 94 [Item No. 41]: Should Sprint be required to comply with FCC rules requiring line-splitting?*

**Legal Requirements:** FCC rules provide that an incumbent LEC must provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. 47 C.F.R. § 51.319(a)(ii). This obligation applies whether the carrier providing voice service provides its own switching or obtains local circuit switching as a UNE. 47 C.F.R. § 51.319(a)(ii)(A). The incumbent LEC is required to make all necessary network modifications, including providing nondiscriminatory access to OSS necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements. 47 C.F.R. § 51.319(a)(ii)(B). Under 47 U.S.C. § 252(d)(1), charges must be nondiscriminatory, just and reasonable.

**KMC's Position:** Yes. Whenever KMC purchases the unbundled loop either as part of UNE-P or otherwise, KMC shall control the entire loop spectrum. Because KMC or a

third party purchases the entire unbundled loop or combination, there are no other monthly recurring charges associated with line splitting arrangement.

**Sprint's Position:** Sprint's proposed language provides only that a CLEC shall control the entire loop spectrum, and does not state that there are no other monthly recurring charges associated with line splitting arrangement.

*Issue No. E.95 [Item No. 42]: What rates, terms and conditions should apply to line-splitting provided by Sprint?*

**Legal Requirements:** FCC rules require an incumbent LEC to provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. 47 C.F.R. § 51.319(a)(ii). This obligation applies whether the carrier providing voice service provides its own switching or obtains local circuit switching as a UNE. 47 C.F.R. § 51.319(a)(ii)(A). The incumbent LEC is required to make all necessary network modifications, including providing nondiscriminatory access to OSS necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements. 47 C.F.R. § 51.319(a)(ii)(B). Under 47 U.S.C. § 252(d)(1), charges must be nondiscriminatory, just and reasonable.

**KMC's Position:** Proposed language provides that within ninety (90) days of the effective date of the interconnection agreement, Sprint shall institute procedures to allow KMC or another carrier to order HFS data capabilities on a UNE loop.

**Sprint's Position:** Sprint proposes to institute procedures to allow KMC or another carrier to order HFS data capabilities on a UNE loop, with no time limitation.

*Issue No. E.97 [Item No. 44]: Should Sprint perform routine network modifications in accordance with FCC rules?*

**Legal Requirements:** FCC rules require an incumbent LEC to make, in a nondiscriminatory fashion, all routine network modifications to unbundled facilities used by requesting telecommunications carriers where the requested facility has already been constructed. Incumbent LECs must make the same routine modifications that they make for their own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. It may also include activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include installation of new aerial or buried cable. 47 C.F.R. § 51.319(8).

**KMC's Position:** Yes, Sprint must perform routine network modifications. Sprint must provide notification to KMC when an order is "Pending" or "No Facilities" when KMC's order requires the construction of a new local loop from scratch by trenching or pulling cable. Sprint shall provide such notification within two (2) business days of order receipt and shall specify whether the orders are rejected due to "Pending" facilities, "No" facilities, or additional construction required. Sprint shall include verification that all equipment and facility

options have been reviewed for availability to provision the requested service, including without limitation, spare or retired copper facilities, next generation equipment and availability of spare timeslots on channel banks. Further, Sprint shall make available, where technically feasible, alternative service options to provide services by the requested due date, including but not limited to Resale services at UNE rates or spare channels on a digital DS1. Such alternatives shall be subject to joint KMC-Sprint technical discussion and review. Following such review, KMC will make the final decision to proceed with a service provisioning alternative.

**Sprint's Position:** No. Sprint does not agree to KMC's proposed language.

*Issue No. E.98 [Item No. 45]: Should Sprint be permitted to impose loop charges which are not approved by the Commission?*

**Legal Requirements:** A LEC may not recover more than its total forward-looking economic cost of providing a network element. § 47 C.F.R. 51.507(e). FCC rules require that loop and subloop costs be recovered through flat-rated charges. 47 C.F.R. § 51.509(a).

**KMC's Position:** No, Sprint may not impose loop charges that are not approved by the COMMISSION. Sprint recovers the cost of routine network modifications to unbundled loop facilities in its monthly recurring rates for the unbundled loop. While the FCC clarified what is encompassed by "routine network modifications," it did not create new obligations of the nature that would permit Sprint to assess new charges.

**Sprint's Position:** Yes. Sprint may unilaterally impose routine network modification charges for unbundled loops, to the extent it believes that certain costs are not recovered in the unbundled loop rates.

*Issue No. E.99 [Item No. 46]: Should Sprint be permitted to impose dedicated transport charges which are not approved by the Commission?*

**Legal Requirements:** State Commissions must establish rates for the transport and termination of traffic consistent with the manner in which carriers incur those costs; the rate of a carrier providing transmission facilities between two carriers' networks shall recover only the costs of the transport the connecting carrier uses to send traffic to the providing carrier for termination. 47 C.F.R. § 51.709. A LEC may not recover more than the total forward-looking economic cost of providing a network element. 47 U.S.C. §251; 47 C.F.R. 51.507(e).

**KMC's Position:** No, Sprint may not impose charges that are not approved by the Commission. Sprint recovers the cost of routine network modifications to unbundled dedicated transport facilities in its monthly recurring rates for the unbundled transport. While the FCC clarified what is encompassed by "routine network modifications," it did not create new obligations of the nature that would permit Sprint to assess new charges.

**Sprint's Position:** Yes. Sprint may unilaterally impose routine network modification charges for unbundled transport, to the extent it believes that certain costs are not recovered in the unbundled transport rates.

## **PART F OF THE AGREEMENT: INTERCONNECTION**

*Issue No. F. 9 [Item No. 61]: Should Sprint be allowed to designate and establish its own Point of Interconnection (POI) for the delivery of Sprint-originated traffic?*

**Legal Requirements:** Sprint has a duty to provide competitors with the facilities and equipment necessary to access Sprint's network "at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2); *see also* § 251(c)(1). The FCC has interpreted this requirement to permit the CLECs, not the ILECs, to designate the POIs on the ILECs' networks.

**KMC's Position:** No. KMC has sole discretion under the Communications Act and the FCC's rules to designate the point of interconnection ("POI") between KMC and an ILEC, including Sprint, and KMC is required to establish only one POI per LATA.

**Sprint's Position:** Yes. Sprint is not proposing that that it be allowed to designate its own POI on KMC's network and recognizes that FCC rules allow the CLEC to select the POI on the ILEC's network. Sprint proposes, however, that it be allowed, at its option, to deliver its originating traffic to multiple locations on KMC's network.

*Issue No. F.11 [Item No. 63]: Should KMC be required to pay Sprint to transport Sprint-originated traffic to the KMC POI?*

**Legal Requirements:** A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network. 47 C.F.R. § 51.703(b). The U.S. Courts of Appeal for the Fourth and Fifth Circuits recently confirmed this prohibition. *See MCIMetro v. BellSouth*, 352 F.3d 872 (2003) and

*Southwestern Bell Telephone Co. v. Public Utilities Comm'n of Texas, et al.*, No. 03-50107, (Oct. 21, 2003). State commissions must establish rates for the transport and termination of traffic consistent with the manner in which carriers incur those costs; the rate of a carrier providing transmission facilities between two carriers' networks shall recover only the costs of the transport the connecting carrier uses to send traffic to the providing carrier for termination. (47 C.F.R. § 51.709). "[A]ll LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination[.]" *Virginia Arbitration Order*, at para. 67 (citing 47 C.F.R. 51.703(b) and 51.709(b), and *Local Competition First Report and Order*, 11 FCC Rcd at 16027-28, para. 1062); *See generally* 47 U.S.C. § 251(c).

**KMC's Position:** No, Sprint may not shift its costs to KMC. Sprint should pay the cost of transporting Sprint-originated calls to the KMC-designated POI, and KMC should pay all transport costs on its side of the POI. Moreover, Sprint may not force KMC to pay for the transport of ISP-bound traffic, originated by Sprint customers, to the designated POI, since Sprint is not entitled to shift to KMC the cost of calls originating on Sprint's network. It is the originating carrier's responsibility (in this case, Sprint's) to deliver, without charge, its originating calls to the CLEC-designated POI pursuant to 47 C.F.R. § 51.703(b). Since the FCC's rules prohibit the ILECs from assessing charges on CLECs for telecommunications traffic that the ILECs originate on their network, requiring KMC to provide the transport (or reimburse Sprint for the costs of such transport) between the originating local calling area and the designated distant POI would directly contravene governing law.

**Sprint's Position:** Yes. FCC Rules 51.703(b) does not apply to ISP-bound traffic. Sprint agrees that it must financially bear the cost to the POI within the local calling area, but it does not agree that it is obligated to absorb the cost of the transport of ISP-bound calls to a

POI outside the local calling area. Rather, Sprint believes that it is entitled to charge KMC for such transport outside the local calling area.

## **PART I OF THE AGREEMENT: GENERAL BUSINESS PROCESS REQUIREMENTS**

*Issue No. I. 34 [Item No. 124]: What should be the appropriate process for billing disputes?*

**KMC's Position:** KMC's proposed process is, based on KMC's experience with Sprint and other ILECs, the most appropriate manner in which to handle billing disputes.

**Sprint's Position:** Sprint asserts that its standard terms should be adopted.

## **PART J OF THE AGREEMENT: REPORTING STANDARDS**

*Issue No. J. 1. [Item No. 162]: By what measures and standards should Sprint's performance be measured?*

**Legal Requirements:** Sprint has, *inter alia*, a duty to provide interconnection with other carriers that is at least equal in quality to that provided to itself or other carriers, on terms and conditions that are just, reasonable and nondiscriminatory, an obligation to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable and nondiscriminatory and in such a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service, and collocation on terms and conditions that are just, reasonable and nondiscriminatory. See 47 U.S.C. §§ 251(a), (c)(2), (c)(3) and (c)(6).



**KMC's Position:** Sprint's performance should be measured utilizing the same measures and standards as BellSouth's, since these performance measures and standards have been fully developed by the Commission with the participation of many carriers.

**Sprint's Position:** The Nevada performance metrics should apply to Sprint's performance in South Carolina.

*Issue No. J. 2. [Item No. 163]: What remedies should be put into place to ensure that Sprint's performance meets appropriate standards?*

**Legal Requirements:** Sprint, as an ILEC, has an obligation to provide interconnection, access to UNEs, collocation and resale in accordance with the Act and State law. Sprint has, *inter alia*, a duty to provide interconnection with other carriers that is at least equal in quality to that provided to itself or other carriers, on terms and conditions that are just, reasonable and nondiscriminatory, an obligation to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable and nondiscriminatory and in such a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service, and collocation on terms and conditions that are just, reasonable and nondiscriminatory. *See* 47 U.S.C. §§ 251(a), (c)(2), (c)(3) and (c)(6). The Commission has the authority to enforce those obligations, and may choose to do so in the most efficient manner. The Commission has already approved self-executing remedies for service quality violations by BellSouth.

**KMC's Position:** Sprint's performance should be subject to remedies analogous to those that apply to BellSouth in order to efficiently ensure that Sprint complies with its obligations under law and the Agreement. The remedy plan adopted by the Commission to

ensure adequate performance by BellSouth should be applied, on a pro-rata basis, to Sprint, since both ILECs are similarly situated in the wholesale/retail marketplace.

**Sprint's Position:** The remedies applicable to BellSouth are not appropriate for Sprint.

#### **PART K OF THE AGREEMENT: COLLOCATION**

***Issue No. K. 8. [Item No. 171 ]:*** Is KMC allowed under prevailing law to share cageless collocation space?

**Legal Requirements:** The *Advanced Services Order (Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 14 FCC Rcd 4761 (March 31, 1999), section 2651(c)(6) of the Communications Act, and 47 C.F.R. § 51.323 of the FCC's rules require incumbent LECs to provide caged and cageless collocation to CLECs.

**KMC's Position:** Yes. One of the principles underlying the FCC's collocation rules and decisions is that the ILEC should not be permitted or encouraged to foist unnecessary collocation costs upon the CLECs. Restricting KMC's ability to sublease an unused portion of its cageless collocation space would be contrary to the FCC's collocation principles. In addition, there are no technical impediments to sharing a cageless collocation space.

**Sprint's Position:** No. The FCC's rules specify that an ILEC must offer shared collocation cages to CLECs. The rules do not require shared cageless collocation.

***Issue No. K. 18 [Item No. 181 ]: When will cross-connect charges apply?***

**Legal Requirements:** 47 U.S.C. §251(c)(6); 47 C.F.R. § 51.323.

**KMC's Position:** Cross-connect charges should apply only when Sprint, upon receipt of an order from KMC for UNEs, services, or interconnection, connects such UNEs, services, or interconnection from Sprint's termination to the demarcation point. As a related matter, Sprint should be required to grandfather existing points of demarcation established at a Sprint-provided POT bay.

**Sprint's Position:** The charges for the cable between Sprint's equipment and KMC's collocation should apply when Sprint incurs the expense, *i.e.*, at the time of installation.

***Issue No. K. 32 [Item No. 195]: Should billing for terminations begin only when services are ordered to those terminations via ASR or LSR?***

**Legal Requirements:** 47 U.S.C. § 251(c)(6).

**KMC's Position:** Yes. Billing should commence when UNE circuits or services are provisioned to specific terminations via an Access Service Request ("ASR") or a Local Service Request ("LSR"). A contrary approach would allow Sprint to double-recover its costs.

**Sprint's Position:** No. Billing should begin when the cable is provisioned—this is consistent with how cost is incurred.

*Issue No. K. 40 [Item No. 203]: Should KMC be allowed to provision cross-connects within its collocation space without application or additional charges by Sprint?*

**Legal Requirements:** 47 U.S.C. § 251(c)(6); 47 C.F.R. § 51.323.

**KMC's Position:** Yes, KMC is entitled to provision its own cross-connects within its own collocation space without being required to submit a collocation application or being subject to additional Sprint charges.

**Sprint's Position:** Self-provisioning of cross-connects should be subject to Sprint's sole discretion.

*Issue No. K. 41 [Item No. 204]: Should Sprint be permitted to limit KMC's right to cross-connect with other collocated carriers?*

**Legal Requirements:** 47 U.S.C. § 251(c)(6); 47 CFR § 51.323(h).

**KMC's Position:** No. KMC may cross-connect to the full extent permitted by law. Specifically, Sprint should not condition Sprint's obligation to provide co-carrier cross-connects on the requirement that the collocation equipment to be interconnected be used for interconnection with Sprint and/or for access to Sprint's UNEs.

**Sprint's Position:** Yes. Sprint is only required to allow KMC to cross-connect with other carriers to the extent permitted by law. The law allows cross-connects with other carriers only under certain circumstances.

***Issue No. K. 42 [Item No. 205]: Should Sprint have sole discretion over whether KMC may use its own technicians to deploy Direct Connects?***

**Legal Requirements:** 47 U.S.C. § 251(c)(6).

**KMC's Position:** No. KMC should be permitted to use its own technicians to provision direct connects ("DCs") in instances where KMC's virtual and/or physical collocation spaces are contiguously located in Sprint's central office.

**Sprint's Position:** Yes. Consistent with FCC rules and orders, KMC may install cross-connects within its shared collocation cage or between adjacent collocation arrangements (subject to Sprint provision of a cable tray). Sprint is not required to allow carriers to deploy cross-connects in the common area of Sprint's central office.

***Issue No. K. 44 [Item No. 207]: Should KMC be allowed to use its own technicians to install CCXCs?***

**Legal Requirements:** 47 U.S.C. § 251(c)(6).

**KMC's Position:** Yes. KMC should be allowed to use its own technicians and deploy its own co-carrier cross-connects ("CCXCs") to interconnect with other collocation telecommunications carriers.

**Sprint's Position:** No. Consistent with FCC rules and orders, KMC may install CCXCs within its shared collocation cage or between adjacent collocation arrangements (subject to Sprint provision of a cable tray). Sprint is not required to allow carriers to deploy cross-connects in the common area of Sprint's central office.

***Issue No. K. 48 [Item No. 211]: May KMC utilize spare capacity on an existing interconnector's entrance facility for the purpose of providing an entrance facility to its collocation arrangement?***

**Legal Requirements:** 47 U.S.C. § 251(c)(6); *see also Triennial Review Order.*

**KMC's Position:** Yes. KMC should be allowed to utilize spare capacity on an existing interconnector's entrance facility. The FCC's expectation that CLECs should be able to rely upon third-party facilities, which the FCC articulated in the *Triennial Review Order*, also justifies KMC's position.

**Sprint's Position:** No. KMC's ability to interconnect with third parties in Sprint's central office is subject to certain limitations. Sprint agrees, however, that KMC may use third party facilities for interconnection with Sprint.

## **VII. PROCEDURAL MATTERS**

18. Section 252(b)(4)(c) of the Communications Act requires that, unless waived by the parties, the Commission should render a decision in this proceeding not later than nine (9) months after the date on which interconnection negotiations formally commenced which, in this case, was December 13, 2003. In order to allow the most expeditious conduct of this arbitration, KMC respectfully requests that the Commission or a designated ALJ issue a procedural order establishing a schedule for discovery, prefiled testimony, prehearing conferences, and the timing and conduct of the hearing in this matter.

### **VIII. CONCLUSION**

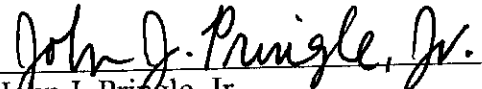
19. Sprint and KMC have, in good faith, attempted to arrive at a mutually acceptable interconnection agreement. While much progress has been made, many issues remain unresolved. Accordingly, KMC calls upon the Commission to arbitrate the remaining unresolved issues.

**WHEREFORE**, KMC respectfully requests that the Commission resolve the outstanding issues between the parties as set forth in this Petition, resolve each such issue in favor of KMC, and grant such other relief as the Commission may deem just and proper.

Respectfully submitted,

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**Dated:** May 21, 2004



**CERTIFICATE OF SERVICE**

I, Carol Roof, do hereby certify that I have, on this 21<sup>st</sup> day of May, 2004,  
caused to be served upon the following individuals, by first class U.S. mail, postage prepaid, a  
copy of the foregoing:

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